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IN THE

Supreme Court of the United States

October Term, 1946

No. 1313

JOHN W. KEMPE,

Petitioner.

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

EUGENE D. O'SULLIVAN, of Omaha, Nebraska,
WILLIAM P. WELCH, of Logan, Iowa,
WILLIAM H. WELCH, of Logan, Iowa, and
BERNARD R. O'CONNOR, of Sioux City, Iowa,
Counsel for Petitioner.

Law Briefs—OMAHA LINO-SLUG PRINTING CO—418 So. 15th St.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

—o—o—

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

OPINION SOUGHT TO BE REVIEWED

Your petitioner, John W. Kempe, respectfully prays that a Writ of Certiorari issue to review a decision of the Circuit Court of Appeals for the Eighth Circuit, rendered on the 3rd day of April, 1947, at Kansas City, Missouri, affirming the conviction of your petitioner in the United

States District Court for the Northern District of Iowa, Honorable Henry N. Graven, District Judge, presiding.

SUMMARY AND SHORT STATEMENT OF THE MATTERS INVOLVED

With the approval of the Court, the United States Attorney for the Northern District of Iowa, on December 8, 1944, filed an Information in eight Counts against the defendant, Counts 1, 3, 5 and 7 charging alleged violations of the Second War Powers Act of 1942, as amended, and Counts 2, 4, 6 and 8 charging alleged violations of the Emergency Price Control Act of 1942, as amended.

The first trial of the case, which commenced on March 21, 1945, in the Federal Building, Sioux City, Iowa, resulted in the jury finding the defendant not guilty as to Counts 1, 2, 5, 6, 7 and 8 of the Information and guilty only as to Counts 3 and 4 thereof. An appeal was taken to the Circuit Court of Appeals, Eighth Circuit. A decision was rendered therein on October 27, 1945. See *Kempe vs. United States,* No. 13076, 151 F. (2d) 680. Following the issuance of the mandate sending the case back to the lower Court for a new trial, a second trial was had in the same Court and before the same Judge, which commenced on June 3, 1946.

The two Counts of the Information upon which the petitioner, John W. Kempe, was tried and convicted at Sioux City, Woodbury County, Iowa, were as follows, and it is our claim that they are not legally proper:

"Count III.

(Referred to as Count I in this case.)

And the said Attorney for the United States, in manner and form as aforesaid, also gives the court

here to understand and be informed that John W. Kempe, whose name other than as herein stated is to this informant unknown, hereinafter referred to as the defendant, on the 4th day of October, 1944, in the City of Sioux City, Woodbury County, Iowa, in the Western Division of the Northern District of Iowa, and within the jurisdiction of this court, being then and there engaged and employed in the trade and business of selling and delivering gasoline in tank wagons to persons who resell the same at retail establishments, did knowingly, wilfully, and unlawfully, in the course of carrying on said trade and business, transfer, sell and deliver to one C. T. Studley, a person who was then and there engaged in the business of reselling gasoline at a retail establishment at Sioux City, Iowa, 500 gallons of gasoline without receiving, or in exchange for, at the time of the actual delivery of the said gasoline, or within five days thereafter, a quantity of coupons or other evidences equal in gallonage value to the 500 gallons of gasoline transferred, which said receipt by said defendant of said coupons or other evidences is by the regulations hereinafter mentioned required, all in violation of Ration Order No. 5C (7 Federal Register 9135), as amended, a regulation made under the Second War Powers Act of 1942 (Sections 631 to 645a, both inclusive, Title 50, United States Code), as amended; contrary to the form of the statute and regulations thereunder in such case made and provided, and against the peace and dignity of the United States of America."

"Count IV.

(Referred to as Count II in this trial.)

And the said Attorney for the United States, in manner and form as aforesaid, also gives the court here to understand and be informed that John W. Kempe, whose name other than as herein stated is to this informant unknown, hereinafter referred to as the defendant, on the 4th day of October, 1944, in the City of Sioux City, Woodbury County, Iowa, in

the Western Division of the Northern District of Iowa, and within the jurisdiction of this court, being then and there engaged in the business of selling and delivering gasoline in tank wagons to persons who resell the same at retail establishments, did knowingly, wilfully, and unlawfully sell and deliver by tank wagon to one C. T. Studley, a person who was then and there engaged in the business of reselling gasoline at a retail establishment at Sioux City, Iowa, 500 gallons of premium motor gasoline, at a price of *19½ cents per gallon*, which said price, as defendant then and there well knew, was higher than his lawful maximum tank wagon price of *16.1 cents per gallon*, for said gasoline prescribed and established by Section 7.4 of Maximum Price Regulation No. 88 (9 Federal Register 1783), as being the lower of either of the normal tank wagon price of the 'reference tank wagon seller' for the State of Iowa, then being the Standard Oil Company of Indiana, as duly posted on October 1, 1941, at Sioux City, Iowa, to persons for resale at retail establishments, which was 16.1 cents per gallon, or, the price as established under Section 5.2(c) of said Regulation by the price charged at Sioux City, Iowa, by the said Standard Oil Company of Indiana on the last sale or premium motor gasoline to a person for resale at a retail establishment, within 60 days prior to October 15th, 1941, which price was 16.1 cents per gallon, plus .7 cents per gallon, making a total of 16.8 cents per gallon, and the said 16.1 cents per gallon being the lower, it was, at said time and place, the defendant's lawful maximum tank wagon price for premium motor gasoline; all in violation of said Maximum Price Regulation 88 (9 Federal Register 1783), a regulation made under the Emergency Price Control Act of 1942 (Sections 901 to 946, both inclusive, Title 50, United States Code) as amended; contrary to the form of the statute and regulations thereunder in such case made and provided, and against the peace and dignity of the United States of America."

TESTIMONY OF CHALLENGED JURORS

JOHN BENKER, a prospective juror, testified he lived at Anthon, Iowa, was a farmer and a member of the Woodbury County Triple A Committee. He also testified, when examined by Mr. Diamond, United States Attorney, that part of his duties consisted of recommending the issuance of ration coupons for gasoline (R. 31 and 37).

This juror further testified that he had something to do with recommendations regarding whether a farmer should have a certain quantity of gasoline with which to operate his machinery; and that as a member of the Township Committee he would have recommendations to the County Committeemen (R. 32).

When examined by Mr. William P. Welch, of counsel for defendant, Mr. Benker stated that he was still a member of the Triple "A" Committee for Woodbury County, Iowa; that he had been such a member since December of 1945; that prior to that time he was a member of the Township Committee since the program was organized; and that he had been constantly engaged in that work (R. 32).

The defendant challenged the juror because his examination disclosed that he was an officer of an agency that had to do with the administration of the regulations under which the defendant had been informed against (R. 32).

The challenge was overruled by the Court and an exception was allowed (R. 32).

JOHN E. DUNCAN, another prospective juror, when

examined by the United States Attorney, testified that he lived at Dickens, Iowa, and was a farmer.

When examined by Mr. William P. Welch, of counsel for the defendant, Mr. Duncan stated, "I am on the Township Committee, Triple A Committee, as a substitute, or one that is called upon when some other one can't be there. I am an alternate." (R. 33.)

The defendant challenged the juror Duncan because he was a member of the "Triple A" Committee in Clay County, Iowa.

The Court overruled the challenge and an exception was allowed (R. 33 and 34).

JOHN A. LULLMAN, another prospective juror, when questioned by Mr. Welch, counsel for the defendant, stated that he had been an alternate member of the rationing board of Buena Vista County, Iowa, and that this was a "Triple A" Committee (R. 34).

The defendant challenged this juror for the reason that the examination disclosed he was a member of the "Triple A" Committee of Buena Vista County.

The Court overruled this challenge and an exception was allowed (R. 34).

In overruling the challenge, the following record was made:

> "MR. WELCH: He is shown by the examination to be an alternate committeeman.
>
> THE COURT: Challenge overruled and denied. You may take your place in the jury box." (R. 34.)

The defendant exercised all of his peremptory challenges and struck from the jury the juror John Benker (R. 31).

Two of the challenged jurors remained upon the jury (R. 31).

SYNOPSIS OF GOVERNMENT'S EVIDENCE IN CHIEF

M. M. WOODS testified to being superintendent of the Standard Oil Company of Indiana and to having posted the Standard Oil record of price ceiling, which is "Exhibit 1" in this record, showing price by a re-seller of gasoline at the time alleged, to a retailer of the highest grade of gasoline, which was 16.1 cents per gallon; and that "Exhibit 1" was posted at his place of business in Sioux City, Iowa, on April 12, 1944 (R. 35).

This exhibit was offered and received in evidence over defendant's objections (R. 35-36).

C. T. STUDLEY, being the person mentioned in Counts 3 and 4 of the Information and referred to as Counts 1 and 2 during the trial of this case, testified that he was seventy years old, a married man, and that he lived with his family in Sioux City; that he was engaged in selling gasoline at 2024 West Fourth Street in Sioux City, Iowa, on October 4, 1944; that he sold to retail consumers and was a dealer; that he knew John W. Kempe, the defendant; that he transacted business with him on October 4, 1944; that he bought some gasoline from him, as witness remembered, and that the amount was 200 gallons, not 500 gallons as alleged in Count 1; that he paid him $39.00 in cash; that he didn't think the defendant asked him for any gas coupons at any time; that he didn't give him any; and that he never talked with defendant since then (R. 36).

On cross-examination, the witness stated that he believed that he got 200 gallons of Ethyl gasoline from Mr. Kempe on October 4, 1944; that he wouldn't swear he didn't get regular gas; that he had signed a statement for OPA that he got 500 gallons of gasoline, but he believed it was 200 gallons of Ethyl he received; and that he notified the Assistant United States District Attorney of this a few months after he signed the statement (R. 37).

Defendant's "Exhibit A" was marked by the reporter (R. 37).

The witness said he didn't remember seeing "Exhibit A" before; that he signed a statement under oath, but didn't know the name of the OPA official; that he believed it was Schneiders; that at that time he was under quite a bit of pressure from the OPA; that they did not put him out of business, but that he quit on his own accord about August 1, 1945; that the witness knew he was violating the law when he paid over-the-ceiling price for gas and when he did not give ration coupons in exchange; and that no charges had ever been filed against him by the United States Attorney (R. 37).

The witness said defendant's "Exhibit B" looked like his handwriting; that he wouldn't say that it was or that it wasn't, but it looked like his; and that he didn't remember ever signing a slip (R. 37).

Witness further stated that he did not remember how many times he had bought gasoline from Mr. Kempe.

"Q. Now, how many times had you bought gasoline from Mr. Kempe?

A. I wouldn't remember. I don't remember.

MR. DIAMOND: I want the Court to note

that question. He has opened the door now." R. 37.)

Witness said he had bought gasoline from Kempe, if he remembered correctly, two or three times; that he kept no records; that the pressure he referrd to had been relieved; that he didn't remember calling Kempe at his home on October 3, 1944, and talking with Mr. Kempe, but it ran in his mind that he drove in; that he could be mistaken; and that he always aimed to have enough money to pay for everything which was delivered (R. 37).

At the request of Mr. Welch, the witness made three samples of his handwriting by writing the following words on a blank sheet of paper which had been marked by the reporter as defendant's "Exhibit C," "Frost S. S." and the witness' initials, "C. T. S." "Exhibits B" and "C" were offered and received in evidence (R. 37 and 38).

"Exhibit B" was a sales slip which Studley was supposed to have initialed on the date of the transaction in question (R. 37).

"Exhibit C," samples of writing of Studley made in the presence of the Court and jury (R. 37 and 38).

This witness said he was mistaken when he said he had not seen or talked to Kempe after October 4, 1944; and that Mr. Kempe did stop at his home when the witness was sick in December, 1944 (R. 38).

On redirect examination, Mr. Studley testified that Kempe came to his home in December, 1944, when the witness was ill; that he did not sign anything for Kempe or give him a paper of any kind; that he didn't intend to falsify any statement; that he had read the affidavit

over, but he must have skipped the amount of gas; that he had two underground tanks, each having a capacity of 520 gallons; and that he didn't remember having signed any receipt for gasoline (R. 38).

On recross examination, Studley stated that he had three tanks underground, but didn't use one of them very often; that he didn't remember of Kempe giving him a sales ticket showing the number of gallons purchased on October 4, 1944; that he didn't keep records of purchases; that he didn't know whether or not he had any coupons on the morning of October 4, 1944; and that he believed it was two or three months after he signed a statement for OPA that he called the Assistant United States Attorney, but it might have been longer (R. 38.

On further redirect examination, Studley said that he would only use the third tank once in a while to keep the pump working, but he had not paid a state or city tax on it;; and that there was no gas put in this tank by Kempe on October 4, 1944.

On further recross examination, Studley admitted that he used tank No. 3 occasionally just to keep it from rusting out (R. 38).

ANTHONY SCHNEIDERS, a witness for the Government, testified he was a former deputy sheriff; that he had been a civilian employee in the United States Army; that he had transferred to the OPA as a special agent in May, 1944, with headquarters in Chicago; that his duties for the most part were in and around Sioux City; that on October 4, 1944, he saw Mr. Kempe leaving his home in a tank truck about 5:30 in the morning; that George Richardson, another special agent for OPA, was with him;

that they observed the defendant driving his truck into Studley's service station and parking it on the southwest side of the station; that they drove one block north of the station and parked where they could observe Mr. Kempe's truck; that Richardson got out of the car and walked by the filling station several times to observe what was taking place there; that the defendant remained at the station approximately twenty minutes, and then got into his truck and drove east on Fourth Street, where they lost sight of him; that the witness remained in the car while Richardson walked by the station; that it was half light—just beginning to get light—and the witness could not see too closely; and that it was approximately 7:30 in the morning (R. 39).

The witness also said he talked to Kempe after October 4, 1944, but Kempe would neither affirm nor deny selling Studley gasoline without coupons (R. 40).

On cross-examination, the witness testified that in his conversation with Kempe he did not tell him that he, the witness, was going to put him, Kempe, in the Federal penitentiary even though the witness had to take his case to the United States Supreme Court (R. 40).

GEORGE RICHARDSON testified that he was employed by the Office of Price Administration during the entire year of 1944; that Sioux City, Iowa, was within the territory in which he operated as an officer of the OPA; that he was in Sioux City on October 4, 1944; that he first saw defendant leaving his home about 5:30 in the morning; that he was in an automobile with Mr. A. J. Schneiders, who had just left the witness stand; that he and Schneiders followed Mr. Kempe's truck to the Studley station, and then parked about one block from the station;

that he got out of the car and walked to the corner of West Fourth Street; that Studley's station is on that corner and he observed Mr. Kempe's truck parked along the office side of the building; that there was a hose connected to one of the outlets in the rear of Kempe's oil truck and the hose was running from the outlet on the truck to the center inlet in the ground; that he observed this operation for, he would say, 20 to 25 minutes; that he walked by the station three times, and at all times the hose from the truck was attached to the same inlet on the ground; and that the hose was under his constant observation (R. 40 and 41).

On cross-examination the witness stated that he walked as far east as the corner; that he kept the hose in sight by looking over his shoulder; that it was dusk and becoming daylight; that he did not stop and talk with Kempe and Studley; that there was a street-light on that corner, and it was lit when they first arrived there about 7:30; that Kempe left about 8 o'clock, and that it was not daylight when he arrived at 7:30 (R. 41 and 42).

R. M. ANDERSON testified that he was in charge of the United States weather bureau, located near Sioux City, Iowa, for the past eight years; and that the sun rose on the morning of October 4, 1944, at 6:25 a. m., Central Standard Time, which would be 7:25 a. m., Daylight Saving Time (R. 47).

On cross-examination the witness testified that, as a matter of fact, for about 30 minutes before you can actually see the sun, it is twilight; and that it was daylight at least one-half hour before you could see the sun (R. 47.)

"MR. DIAMOND: The Government rests.

MR. WELCH: Comes now John W. Kempe, defendant herein, at the close of all the evidence offered by the plaintiff, the United States of America, and after the plaintiff had rested its case, and respectfully moves this Honorable Court to enter a judgment of acquittal in favor of the defendant, for the following reasons (R. 43, 44, 45, 46):

THE COURT: It is the ruling and order of the Court that the motion for judgment of acquittal is hereby denied. (Exception.) (R. 46.)

MR. WELCH: It is hereby stipulated and agreed between the plaintiff and the defendant that on the morning of October 4, 1944, the defendant, John W. Kempe, did sell and deliver to the witness, Studley, certain gasoline." (R. 46.)

DEFENDANT'S TESTIMONY

GEORGE W. HUTCHINS' testimony is not material (R. 48).

FRED RIZK testified that he was vice-president of the Interstate Oil Company in Sioux City; that he had charge of the records of the Interstate Oil Company and they were prepared under his immediate supervision; that he had been requested by the defendant to produce certain records and he had them with him; that these records show sales of gasoline to the defendant on May 5, May 10, June 3, June 16, July 19, August 10, August 25 and September 15, 1944; that these records were marked as "Exhibits K, L, M, N, O, P, Q," and "R"; that the exhibits were part of the permanent records of his office; that they had supplied Mr. Kempe with Ethyl gasoline when it was short and hard to get; that they took better care of him than they did others; that he had known the defendant

for the last seven years; and that they gave him half of his purchases in Ethyl (R. 48 and 49).

"Exhibits K" through "R," both inclusive, and "Exhibit A" were offered and received in evidence (R. 49).

"Exhibit A" was a carbon copy of an invoice from the Interstate Oil Company to the defendant showing a sale of 1,260 gallons of regular gasoline on October 4, 1944 (R. 71).

On cross-examination, the witness stated that there was no place nor any signification of any kind connecting C. T. Studley with any of these transactions; and that C. T. Studley did not appear at his office in connection with a single one of the transactions indicated in the exhibit (R. 49).

Defendant's "Exhibits S" to "Z," duplicates of "Exhibits K" to "R," were received in evidence (R. 50).

On redirect examination, the witness said the warehouse opened at 7:00 in the morning, but there were occasions when it might have been opened half an hour earlier (R. 51).

JOHN W. KEMPE, the defendant, testified that he had worked for the Hinton Co-op Oil Company of Hinton, Iowa, since about December 1, 1936; that he furnished the truck and the Hinton Oil Company furnished the tank; that he was working for the Hinton Co-op Oil Company on October 4, 1944; that the tank on the truck had four compartments, two of 200 gallons and two of 100 gallons; that each 200-gallon tank would hold an additional 14 gallons and the 100-gallon tanks would hold 7 gallons more,

making a total of 642 gallons; and that each compartment had a separate outlet at the rear of the truck (R. 52).

That he knew C. T. Studley, who testified for the Government; that he was at the Studley station on the morning of October 4, 1944; that he delivered 640 gallons of regular gas to him at his station; that Studley paid him $93.44 while the gasoline was being unloaded; that would be 14.6 cents per gallon; that he had a Hinton Co-op Oil Company ticket and he wrote it up and signed it; that "Exhibit B" is in his handwriting and also C. T. Studley's; that he saw Studley sign it about 7:45 in the morning of October 4, 1944; that Studley hesitated to sign it because he hadn't signed any others; that Studley gave him enough ration coupons for 640 gallons of gasoline at that time; that he did not sell Studley any Ethyl gas on October 4, 1944, although he had ordered some; that he was unable to get Ethyl gasoline from the Interstate Oil Company because they were short; that he unloaded nearly 400 gallons in the west inlet of Studley's station and the balance in the east inlet; that the middle inlet was for Ethyl gasoline, but he didn't have any Ethyl that morning; that "Exhibit B" is a carbon copy out of a book of 50; that the original is white and the duplicate is yellow; and that he signed and gave Mr. Studley the white one (R. 53).

The witness continued by saying that he sold Mr. Studley 640 gallons of gasoline every 12 to 15 days for 15 months; that he had only 8 sales slips and they started some time in April, 1944, to October, 1944; that Mr. Anthony Schneiders took the rest of the sales slips before April, 1944, and never returned them; and that he had the receipt, which Schneiders had given to his wife (R. 53).

Defendant's "Exhibits UU" to "triple B," both inclusive, were so marked by the reporter (R. 53).

The witness said these were sales slips in his handwriting and were signed in the presence of Mr. Studley, showing delivery of gasoline to Studley by the witness on May 5, May 11, June 3, June 16, July 19, August 10, August 25 and September 15, all in the year of 1944; and that these 8 slips are all carbon copies; that he gave the originals to Mr. Studley.

Defendant's "Exhibit UU" to "triple B" were offered and received in evidence (R. 54).

The defendant further stated that he talked to Mr. Anthony J. Schneiders in the county jail after being arrested; that Schneiders told him he had been a deputy sheriff for five years, and a boss of the airbase for two years, and Schneiders further said, "Kempe, unless you come clean and tell us who is above you, I will carry it to the Supreme Court of the United States, and send you to the Federal penitentiary" (R. 54).

The defendant said he did not answer Schneiders (R. 54).

On cross-examination, defendant stated that while working for the Hinton Co-op Oil Company, he also worked on his own account selling petroleum products to his own customers; that Mr. Hansen of the Hinton Co-op had knowledge for years that he was selling gasoline independently; that he carried as many as five or six sales books in the truck; that he didn't use one up and then start on a new one, but would just use whichever one he happened to get hold of; and that he got coupons from Studley on October 4, 1944 (R. 54).

We claim that the following was misconduct on the part of counsel for the Government:

"Q. Isn't it a fact that before October 4, 1944, in that summer or fall of 1944, before that date, that you were short of coupons and that you offered to buy coupons from a girl at the Toy National Bank here in Sioux City?

MR. WELCH: That is objected to as improper, prejudicial to the rights of the defendant; it refers to a transaction other than those laid in the information; not proper cross examination; not proper foundation for impeachment.

THE COURT: The objection is sustained.

MR. WELCH: And the defendant asks the Court to instruct the jury to disregard the question and its implications.

THE COURT: The jury is instructed to disregard any implications in the question." (R. 54 and 55.)

Mr. Moody, a former employee of the OPA, did not return to the witness or his wife, the documents which were taken in April, 1944 (R. 55).

Mr. Diamond brought out from the witness that he had given the original of "Exhibit B" to Mr. Studley; that Mr. Richardson was pointed out to him by someone in the Sioux City post office, sometime in August, 1944, as an agent of the OPA; and that he had not asked Mr. Studley to sign his full name on the sales ticket "Exhibit B" because he never told a man how to sign his name (R. 55).

"Q. Have you made any attempt whatever to procure for evidence in this case, since you were arrested, the gasoline coupons which you claim now Mr.

Studley turned over to you on the morning of October 4, 1944?

MR. WELCH: That is objected to as improper cross-examination. It presupposes the duty upon the part of the defendant to do such things as are indicated in the question.

THE COURT: Overruled.

A. I have turned them into the Interstate Oil Company." (R. 55.)

The witness stated further that he put better than 400 gallons of gas in the west tank and the balance in the east tank of Mr. Studley's station on October 4, 1944 (R. 55).

"Exhibits D" through "J", photographs of Studley's oil station, were offered and received in evidence (R. 55).

Defendant's "Exhibit K" through "Exhibits R, B and C, A and II to TT", both inclusive, offered and received in evidence (R. 56).

The defendant rests.

GOVERNMENT'S REBUTTAL TESTIMONY

The witness, C. T. Studley, testified that the defendant did not pay him on the morning of October 4th, 1944, the sum of $93.65 as he, Kempe, testified he did, but on the contrary he paid the defendant $39.00 (R. 58); that this payment was made after the gasoline was unloaded (R. 58); that while the gasoline was unloaded he was in the station most of the time (R. 58); that he wrote in a heavy handwriting (R. 59); that when the defendant delivered the gasoline on October 4th, 1944, he never gave him any sales slip or ticket (R. 59); that the writing on

Exhibit "B", claimed by the defendant to have been his, was so faint that he could hardly tell whether it was his or not, but that he would say that it was not his (R. 59).

Anthony J. Schneiders testified that he talked to the defendant in the Sioux City, Iowa Jail (R. 64); that he at no time said anything to Kempe about a penitentiary or threatened him in any way (R. 66). We further claim that the following questioning was improper and also amounted to misconduct upon the part of counsel for the Government:

"Q. Now, you say there was a talk had but not such a talk. Now, tell the jury, as near as you can recall, everything that was said between you and him on that occasion?

MR. WELCH: Objected to as not rebuttal.

THE COURT: Objection overruled. He may answer. (Exception.)

A. I told Mr. Kempe that we had observed his movements and that we had obtained confessions—

Q. Had obtained what?

MR. WELCH: Objected to as not rebuttal and not referable to the counts in the Information, the two counts in the Information. Matters not laid in the pleading against the defendant and not competent and not rebuttal.

MR. DIAMOND: Wait a moment. I will withdraw it or, rather, let me give the witness an admonition. There may be something in counsel's objection. We didn't know he was going to say it.

MR. WELCH: I object to counsel's remarks about my objection.

No ruling by the Court. (R. 65.)

Q. Now, there was nothing on the part of the Government to draw out from the witness anything about transactions other than this one.

MR. WELCH: The defendant objects to the counsel for the Government instructing the witness in making these assertions in the presence of the jury.

MR. DIAMOND: Well, do you want him to go ahead and talk?

THE COURT: Just a minute, Mr. Diamond. The witness will answer the question and will omit any reference to any other transaction.

A. I informed Mr. Kempe that evidence had been obtained.

MR. WELCH: I move to strike. This is not rebuttal and improper in form and incompetent.

THE COURT: Objection overruled. (Exception.)

A. And that I was interested in where he obtained—

Q. I am not asking what you were interested in. Please answer my question directly. What did he say to you? What did you say to him? Don't repeat any part of the conference if it refers to anything other than the Studley transaction.

MR. WELCH: We object to the statement by the counsel for the Government as highly improper.

THE COURT: Objection overruled. The jury will pay no attention to any implication. You may answer. (Exception.)

A. I told Mr. Kempe that I was interested in the higher-ups and I wanted him to disclose the source of his coupons in order to sell gasoline without coupons. (R. 66.)

MR. WELCH: I move to strike that as highly prejudicial. It assumes matters not in the record and not competent and not referable to the counts in this Information.

THE COURT: Objection overruled. (Exception.)

A. Mr. Kempe did not reply to my question. He just sat there and looked down. I informed him that the evidence—

Q. Don't say 'I informed him.'

A. I told him—

MR. WELCH: I object. It is evident that he is going to give hearsay testimony in the presence of the jury.

THE COURT: Objection overruled. (Exception.)

A. I told him that the evidence we had obtained would possibly result in criminal prosecution for him.

MR. WELCH: I move to strike that as hearsay and highly improper.

THE COURT: Objection overruled. (Exception.)

A. Then Mr. Kempe said he would fight it and clear to the Supreme Court, if necessary."

MR. GEORGE RICHARDSON, recalled in rebuttal, said as follows:

"I heard Mr. Kempe testify he saw me in the Sioux City post office during August of 1944. I was not in Sioux City before October 2, 1944." (R. 67.)

"MR. DIAMOND: The Government rests.

"MR. WELCH: The record will show that the defendant renews the motions made by him at the

close of the evidence offered by the Government in chief and every part of said motion on each ground therein stated and also moves the Court for a judgment of acquittal in favor of the defendant.

"THE COURT: The ruling will be the same. (Exception.) (R. 56.)

"MR. DIAMOND (in argument to the jury): The first thing, Ladies and Gentlemen, that I want to say to you at the outset is, counsel for the other side has left an impression in your mind of why didn't we prosecute Mr. Studley. Now, I want to say to you, Ladies and Gentlemen, that counsel knows very well why we didn't. Under our statutes, you can't compel a witness to take the stand against himself.

"MR. WELCH: That is objected to as incompetent and highly improper. It is prejudicial to the rights of the defendant.

"THE COURT: Objection overruled. (Exception.) (R. 67.)

Further record was made of prejudicial argument to the jury by the United States Attorney (R. 67 and 68).

Motions in arrest of judgment and for a new trial were duly filed and overruled by the Court, to which exceptions were taken (R. 30).

The defendant was sentenced to one year imprisonment on each Count, the sentence to run concurrently (R. 88).

We call the Court's attention to the fact that in the 14 Instructions which the Court gave to the jury there was an utter failure to quote or give the context of any Regulation or law upon which either of the two aforementioned Counts were predicated or grounded.

BASIS OF JURISDICTION

The Jurisdiction of this Court is invoked under Section 240a of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. C. A., Title 28, Section 347).

QUESTIONS PRESENTED

1. Were Counts 3 and 4, and each of them, which Counts are also referred to in the Trial Proceedings as Counts 1 and 2, respectively, so vague, indefinite and uncertain, and so non-informative and so replete with conclusions and barren of facts that they, and each of them, violated the following Constitutional provisions, and each of them?

(a) Section 5 of the Amendments to the United States Constitution, which in so far as same is applicable, provides that "No person * * * shall be deprived of * * * liberty * * * without due process of law."

(b) That part of Section 6 of the Amendments to the United States Constitution, which states that "In all criminal prosecutions the accused shall * * * be informed of the nature and cause of the accusation made against him."

2. Was it error on the part of the Trial Court to refuse to sustain defendant's several challenges for cause of the following named jurors, and each of them, they having admitted upon their voir dire examination that they were employees, agents and servants and officials of certain administrative agencies of the United States Government, to-wit, John Benker, a member of the Woodbury County, Iowa, Agricultural Adjustment Association, commonly known as the "Triple A," who, while the gaso-

line rationing law was in effect, recommended the issuance of gasoline coupons for farm and tractor gasoline; John E. Duncan, an alternate member of the Township Committee of the Agricultural Adjustment Association, commonly known as the "Triple A," but who never was called to act as such alternate member of the Committee; and John A. Lullman, a former alternate committee member of the Buena Vista County, Iowa, Rationing Board during war time, and presently an alternate member of the Agricultural Adjustment Association, commonly known as the "Triple A," of Buena Vista County, Iowa?

3. Was there a failure on the part of the United States to prove John W. Kempe, the defendant, guilty by the proper quantum of proof?

4. Was Tobias E. Diamond, the United States Attorney for the Northern District of Iowa, guilty of such misconduct during the course of the trial as prevented the defendant from having a fair and impartial trial as required by the law?

5. Was it reversible error on the part of the Trial Judge to fail to instruct the jury, on his own motion, as to the applicable United States Statutes and Regulations upon which the two Counts of the Information, and each of them, were grounded, either by quoting said Statutes and Regulations verbatim, or by explaining them in other language, in order that the jury might have a clear understanding of the applicable law before applying it to the facts?

WHEREFORE, your petitioner prays that a Writ of Certiorari issue under the seal of this Court, directed to the

Circuit Court of Appeals for the Eighth Circuit, commanding said Court to certify and send to this Court, a full and complete Transcript of the Record and of the proceedings of the said Circuit Court had in the case numbered and entitled on its Docket No. 13416, Criminal, *John W. Kempe, Appellant, vs. United States of America, Appellee,* to the end that this cause may be reviewed and determined by this Court, as provided for by the Statutes of the United States, and that the Judgment herein of said Circuit Court may be stayed, and petitioner released on bail during the pendency of this appeal, and that the Judgment herein may be reversed by this Court, and for such other and further relief as to this Court may seem proper.

EUGENE D. O'SULLIVAN, of Omaha, Nebraska,
WILLIAM P. WELCH, of Logan, Iowa,
WILLIAM H. WELCH, of Logan, Iowa,
BERNARD R. O'CONNOR, of Sioux City, Iowa,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

—o—o—

October Term, 1946

—o—o—

No.————

—o—o—

JOHN W. KEMPE,

Petitioner.

vs.

UNITED STATES OF AMERICA,

Respondent.

—o—o—

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

—o—o—

THE OPINIONS OF THE LOWER COURTS

The opinion of the Circuit Court of Appeals for the Eighth Circuit has not, as yet, been reported in the Advance Sheets. The decision in the case, however, was rendered on April 3rd, 1947, and same is to be found in the printed Record at pages 95 to 104, inclusive.

JURISDICTION

As aforestated, the opinion of the Circuit Court was rendered on April 3rd, 1947 (R. 95 to 104, incl.), and no

Petition for a Rehearing was filed. A Motion to Stay the Mandate was filed on April 25, 1947, and an Order Staying the Mandate until final disposition of the case by the Supreme Court was made by the Court on April 25, 1947.

The Jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13th, 1925, Section 347, Title 28, U. S. C. A.

STATEMENT OF THE CASE

A rather complete statement of the case having been made in the Petition for the Writ of Certiorari, it would serve no useful purpose to restate the facts in the case here. The Court's attention is therefore directed to pages 2 to 9 of said Petition.

SPECIFICATIONS OF ERROR

1. That Counts 3 and 4, and each of them, which Counts are also referred to in the Trial proceedings as Counts 1 and 2, respectively, are so vague, indefinite and uncertain, and so non-informative, and so replete with conclusions, and barren of facts, that they, and each of them, violate the following constitutional provisions, and each of them:

(a) Section 5 of the Amendments to the United States Constitution, which in so far as same is applicable, provides that, "No person * * * shall be deprived of * * * liberty * * * without due process of law."

(b) That part of Section 6 of the Amendments to the United States Constitution, which states that, "In all criminal prosecutions the accused shall * * * be informed of the nature and cause of the accusation made against him."

2. That it was error on the part of the Trial Court to refuse to sustain defendant's several challenges for cause of the following named jurors, and each of them, they having admitted upon their voir dire examination that they were employees, agents and servants and officials of certain administrative agencies of the United States Government, to-wit,—John Benker, a member of the Woodbury County, Iowa, Agricultural Adjustment Association, commonly known as the "Triple A," who while the gasoline rationing law was in effect recommended the issuance of gasoline coupons for farm and tractor gasoline; John E. Duncan, an alternate member of the Township Committee of the Agricultural Adjustment Association, commonly known as the "Triple A," but who never was called to act as such alternate member of the Committee; and John A. Lullman, a former alternate committee member of the Buena Vista County, Iowa, Rationing Board during war time, and presently an alternate member of the Agricultural Adjustment Association, commonly known as the "Triple A," of Buena Vista County, Iowa.

3. That there was a failure on the part of the United States to prove John W. Kempe, the defendant, guilty by the proper quantum of proof.

4. That Tobias E. Diamond, the United States Attorney for the Northern District of Iowa, was guilty of such misconduct, during the course of the Trial, as prevented the defendant from having a fair and impartial trial as required by the law.

5. That it was reversible error on the part of the Trial Court to fail to instruct the Jury, on his own motion, as to the applicable United States Statutes and

Regulations upon which the two Counts of the Information, and each of them were grounded either by quoting said Statutes and Regulations verbatim, or by explaining them in other language, in order that the Jury might have a clear understanding of the applicable law before applying it to the facts.

ARGUMENT

Point 1

In the last opinion in this case the Court refused to consider this matter because same had been disposed of in the first decision in this case, which is to be found in 151 F. (2d) 680, and also because they concluded that the contention of appellants was without merit.

It will be observed from a reading of Counts 3 and 4 that the place of the alleged offence was stated to be Sioux City, Woodbury County, Iowa, a place which, according to the last census, had a population of 87,791 people, which necessarily would indicate that it covered, like, most midwestern cities, quite a large area of land, and had many streets and cross-streets within its city limits.

In *Jarl vs. United States* and *Monroe vs. United States,* 19 F. (2d) 891, and in *Gaughan vs. United States,* 19 F. (2d) 897, indictments which charged that the offenses were committed in Omaha, Nebraska, were held to be improper and the cases were reversed by the 8th Circuit Court of Appeals.

In Count 3 the laws and regulations which were allegedly violated were "Ration Order No. 5C (7 Federal Register 9135) as amended, a regulation made under

the Second War Power Act of 1942 (Sections 631 to 645a, both inclusive), Title 50, United States Code as amended."

A perusal of 7 Federal Register 9135 will show that page 9135 is taken up entirely with the preamble of the Act. The index is on page 9136. About one-half of page 9137 is taken up with the Scope of the Act. Definitions take up the other half of page 9137 and continue to about one-third of page 9139. From page 9139 to page 9160 there is set forth all of the various regulations and, although the writer studied these regulations carefully, he could not ascertain which one the defendant was supposed to have violated. The Information alleged that he violated the preamble, because it is the only reading matter on page 9135, the only page of the Federal Register which was quoted.

The Second War Powers Act of 1942 covers 21 pages of solid reading matter in 50 United States Code Annotated, commencing at page 253 and ending at page 274. It has 14 sections, their numbers being from 631 to 645(a), and they contain a multitude of unrelated subjects. Just which one covers the instant case is hard to ascertain. The headings of the 14 sections or titles in the proper numerical order are: Emergency Powers of the Interstate Commerce Commission Over Motor and Water Carriers; Acquisition and Disposition of Property; Priorities Powers; Purchase by Federal Reserve Banks of Government Obligations; Waiver of Navigation and Inspection Laws; Power to Requisition; Political Activity; Protection of War Industries and Protection of Resources Subject to Hazards of Forest Fires; Free Postage for Soldiers, Sailors and Marines; Naturalization of Persons Serving in the Armed Forces of the United States During

the Present War; Acceptance of Conditional Gifts to Further the War Program; Coinage of 5-Cent Pieces; Inspection and Audit of War Contractors; and Utilization of Vital War Information.

If anyone can select from these titles the applicable section of the Second War Powers Act of 1942 which it is claimed is the authority for making the alleged regulation he can do better than the defendant's counsel. The pleader's claim in the Information is, however, that the authority springs from all of these titles or, as he puts it, in the Information, Sections 631 to 645(a), both inclusive.

In Count 4 the laws and regulations which were allegedly violated were "Maximum Price Regulation 88" (9 Federal Register 1783), a regulation made under the Emergency Price Control Act of 1942 (Sections 901 to 946, both inclusive, Title 50, United States Code).

A perusal of 9 Federal Register 1783 will show that the document, Maximum Price Regulation 88, commences at page 1783 and extends to page 1808 of 9 Federal Register and that Section 7.4 of same is not on page 1783 of 9 Federal Register, but is on page 1808.

A check of 50 U. S. C. A., at pages 313 to 448, will disclose that the Emergency Price Control Act of 1942 covers 135 pages of close printing and that the topical sections run from Sections 901 to 946, inclusive. These 45 sections, covering 135 pages, cover such a mass of reading matter that to find the applicable section upon which the Regulation 7.4 was grounded would be like trying to find a needle in a haystack.

In all fairness, a United States District Attorney is asking too much of a defendant and his counsel and of

courts of law to hide the regulations and basic laws away in this fashion. It is such a time-waster and such a purposeless thing to do, aside from the fact that such a course of procedure is not constitutional surely, and in keeping with the pronouncements found in the 5th and 6th Constitutional Amendments, and the legal pronouncements of the courts as gleaned from the decided cases from the very beginning up to the present time.

Another question deserves attention and that is that under the charge in Count 4 Kempe was required under the law to get his ceiling price not from any law or regulation, but from the price posted at the place of business of Standard Oil Company of Indiana in Sioux City, Iowa. Just how it is legal and proper to have the very company who is notorious for price fixing determine the ceiling price seems too strange to be good law. The laws and regulations should state the price and not a fellow dealer in gasoline.

In almost every instance where the so-called streamlined Indictment or Information is attacked because it contains conclusions and is barren of facts, vague, indefinite and uncertain, the prosecution urges that "An indictment for a statutory offense is sufficient if the offense is set forth substantially in the words of the statute." If the case arrises in the 8th Circuit the case relied on is *Myers vs. United States,* 15 Fed. (2d) 977, which always is an unfortunate selection, since the Myers case was, shortly after its publication, severely criticized by the Eighth Circuit Court of Appeals, in *Jarl vs. United States,* 19 Fed. (2d) 891, in which the Court adopted the *dissenting* opinion in the Myers case, and reaffirmed its holding in *Lynch vs. United States,* 10 Fed. (2d) 947, and previous cases.

In the Lynch case the Court, through Walter H. Sanborn, Circuit Judge, said:

> "The defendant in a criminal case, in view of his presumed innocence, is not only entitled to know from the statements of the indictment what facts the prosecution considers sufficient to make him guilty of the offense charged, with reasonable particularity, so that he may procure witnesses and make proper defense thereto, but he is also entitled to demand that the indictment charge the essential facts so specifically that the judgment rendered will be a complete defense to a second prosecution for the same offense. United States v. Hess, 124 U. S. 483, 8 S. Ct. 571, 31 L. Ed. 516; Armour Packing Co. v. United States, 153 F. 1, 82 C. C. A. 135, 14 L. R. A. (U. S.) 400; Floren v. United States, 186 F. 961, 108 C. C. A. 577."

In the Myers case the dissenting opinion (since then adopted as the correct view by the Eighth Circuit Court of Appeals), the Court reviewed the holding uniformly adhered to in this circuit, beginning with *Miller vs. U. S.*, 133 Fed. 337 (Eighth C. C. A.), in which it was said:

> "It must set forth the facts which the pleader claims constitute the alleged transgression so distinctly as to advise the accused of the charge which he has to meet, so fully as to give him a fair opportunity to prepare his defense, so particularly as to enable him to avail himself of a conviction or acquittal in defense of another prosecution for the same crime, and so clearly that the court, upon an examination of the indictment, may be able to determine whether or not, under the law, the facts there stated are sufficient to support a conviction."

Continuing the dissenting opinion in the Meyers case, Booth, Circuit Judge, referring to the Miller case, said:

"The tests thus laid down have been consistently recognized by this court. Goldberg v. United States (C. C. A.), 277 F. 211, 215; Armour Packing Co. v. United States, 153 F. 1, 15, 82 C. C. A. 135, 14 L. R. A. (N. S.) 400; Fontana v. United States (C. C. A.), 262 F. 283, 286; Weisman v. United States (C. C. A.), 1 F. (2d) 314; Lynch v. United States (C. C. A.), 10 F. (2d) 947."

In the case of *Jarl vs. United States,* 19 Fed. (2d) 891 (8 C. C. A.), in the opinion by Lewis, Circuit Judge, the Court said:

"These questions were ably discussed and ruled upon by this court in Lynch v. United States, 10 Fed. 2d 947. The opinions which we have cited and many others were there considered, and we agree with what is there said. . . . But it is claimed that the majority opinion in the later case of Myers v. United States, 15 Fed. 2d 977, overruled the Lynch case. We do not think so. . . . The other propositions discussed in that (Myers) case, contrary to the conclusions in the Lynch case and contrary to the view which we are now attempting to maintain, were vigorously combatter in a clear and forceful dissent, which we think announsed the correct rule, by which the sufficiency of a criminal charge must be tested."

As far back as 1813, Mr. Chief Justice Marshall, in the case of *The Hoppet vs. United Siates,* 7 Cranch. 389, 3 L. ed. 380, stated the purpose of a criminal accusation as being:

"1. That the party accused may know against what charge to direct his defense.

"2. That the court may see with judicial eye that the fact alleged to have been committed is an offense against the laws, and may also discern the punishment annexed by law to the specific offense."

The Sixth Amendment to the Constitution guarantees this fundamental right to every accused. Thus, in the case of *United States v. Cruikshank* (1875), 92 U. S. 542, 23 L. ed. 588, Mr. Chief Justice Waite commented on the Sixth Amendment as follows:

> "In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right 'to be informed of the nature and cause of the accusation.' Amend. VI. In United States v. Mills, 7 Pet. 142, this was construed to mean that the indictment must set forth the offense 'with clearness and all necessary certainty, to appraise the accused of the crime with which he stands charged'; and in United States v. Cook, 17 Wall. 174, that 'every ingredient of which the offense is composed must be accurately and clearly alleged.' . . . The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that they may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place and circumstances."

Since there are no so-called common law crimes in Federal Jurisprudence, all offenses are statutory and usually the statute defines with some particularity the conduct proscribed by the law. This has led to the charging of offenses in the language of the statute, which in most cases informs the defendant with sufficient exactitude of the nature of the accusation against him. Mr. Justice Field related this practice in *Ex Parte Virginia*, 100 U. S. 339, 25 L. ed. 676:

> "It is not enough to repeat the definition of the offense in the general language of the statute, and then aver that the defendant has been guilty of the offense thus defined, without other specification. . . . This doctrine is only common learning; it is found in the hornbooks of the law; it is on the pages thumbed by the student in his first lessons in criminal procedure." (Citing Bishop Criminal Procedure and Archbold Criminal Practice and Pleading.)

While all Courts have not followed the views of Mr. Justice Field, particularly where the statutory language is such as to include all of the essential ingredients of the offense charged and to apprise the accused fully, directly and expressly of the crime for which he is intended to be punished, there is universal agreement that where the language of the statute is in general terms, or omits necessary elements, or where literally construed the statute embraces innocent acts, an Indictment in the language of the statute is insufficient. This is sometimes referred to as an exception to the general rule permitting an Indictment in statutory language, while some text writers refer to it as an independent rule of pleading. In either event, the rule is as well established and recognized as the general rule.

In 27 Am. Jur., page 662, Indictments and Informations, Section 103, it is declared:

> "The general rule that an indictment or information for a statutory offense is sufficient if the offense is charged in the words of the statute, either literally or substantially, or in equivalent words, is without application, where the statutory words do not in themselves fully, directly and expressly, without uncertainty or ambiguity, set forth all the elements and ingredients necessary to constitute the offense intended to be punished. As the courts have pointed out, the

words of the statute may be sufficient to describe or legally characterize the offense denounced, and yet be wholly insufficient to inform the accused of the specific offense of which he is accused, so as to enable him to prèpare his defense or plead his conviction or acquittal as a bar to further prosecution for the same offense, as where the statute characterizes the offense in mere general or generic terms, or does not sufficiently define the crime or set forth all of its essential elements. In such a situation, the statutory words must be supplemented by other allegations which clearly and acurately set forth every ingredient of the offense with such precision and certainty as to leave no doubt in the minds of the accused and the court as to the exact offense intended to be charged. An information charging an offense in the words of a statute which defines an offense generally is insufficient where it alleges the offense in the language of the statute, but does not state the specific acts on which the charge is based, and is not sufficiently definite to be of any value as a bar to further prosecution."

The editors of Corpus Juris set out the following instances where an Indictment in the language of the statute is not sufficient, in 31 C. J., pages 712-713:

"Section 264 (e), Where Statute Employs Technical or Generic Terms. Where technical terms or legal conclusions are used, there should be a specification of facts to inform the accused of the charge which he must meet; and where the definition of the offense includes generic terms the indictment must state the species. When the fact which is made by the statute an essential element of the crime is a collective or general one, it is necessary to specify the particular thing intended to be charged. * * *"

"Section 265 (f), Where Statutory Language May Include Innocent Acts. It is not sufficient to charge an offense in the language of the statute alone,

where by its generality it may embrace acts which it was not the intent of the statute to punish. Such facts must be alleged that, if proved, defendant cannot be innocent. If the statute is confined to certain classes of persons or to acts done at some particular time or place, the indictment must show that the party indicted and the time and place when the alleged criminal acts were perpetrated, were such as to bring the supposed offense directly within the statute. And where a statute makes various classes of persons subject to its provisions, the indictment should aver the facts showing in which class defendant lies. * * *"

"Section 266 (g), Where Statutory Language Is Indirect Or States Conclusions. Where a charge in the language of the statute charges a mere legal conclusion, or where it connects accused with the crime by mere inference or argument, a more particular statement of the facts is necessary. * * *"

But whether, as an exception to a general rule or as an affirmative rule in its own right, all Courts agree that the requirement of the Sixth Amendment is not served by charging an offense in the language of the statute unless the words of the statute in themselves fully, directly and expressly, without uncertainty or ambiguity, set forth all of the elements and ingredients necessary to constitute the offense intended to be punished. Recently, in the leading case of *People v. Green,* 368 Ill. 242, 13 N. E. (2d) 278, 115 A. L. R. 348, the Court had occasion to reaffirm the effectiveness and validity of this rule of pleading:

"It will thus be seen that if an information in the words of the statute without specific allegation of fact, is in all cases sufficient, and if there are no exceptions to that supposed rule, this information is good. We find, however, that the rule is not as stated, and that the exception to it is as well settled as the asserted rule. This exception has been frequently

stated and always adhered to by the Supreme Court of the United States. Thus, in United States v. Carll, 105 U. S. 611, 613, 26 L. Ed. 1135, Mr. Justice Gray said:

"'In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished.' The same rule is laid down and adhered to in United States v. Cook, 17 Wall. 168, 21 L. Ed. 538; United States v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588; United States v. Simmons, 96 U. S. 360, 24 L. Ed. 819; Evans v. United States, 153 U. S. 584, 14 S. Ct. 934, 936, 38 L. Ed. 830. In the last case the court said: 'Even in the cases of misdemeanors, the indictment must be free from all ambiguity and leave no doubt in the minds of the accused and the court of the exact offense intended to be charged, not only that the former may know what he is called upon to meet, but that, upon a plea of former acquital or conviction, the record may show with accuracy the exact offense to which the plea relates. United States v. Simmons, 96 U. S. 360 (24 L. Ed. 819); United States v. Hess, 124 U. S. 483, 8 S. Ct. 571 (31 L. Ed. 516); Pettibone v. United States, 148 U. S. 197, 13 S. Ct. 542 (37 L. Ed. 419); In re Greene (C. C.), 52 F. 104.'"

In the case of *Miller v. United States,* 288 Fed. 816 (C. C. A. Fifth, 1923), the Court said:

"It is not sufficient to charge an offense solely in the language of the statute, unless such charge makes such statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description with which he is charged, to the end that he may prepare his defense and plead the judgment as a bar to any subsequent prosecution for the same offense. United States v. Hess, 124 U.

S. 483, 487, 8 Sup. Ct. 571, 31 L. Ed. 516; Larkin v. United States, 107 Fed. 697, 699, 46 C. C. A. 588; Fehringer v. People, 59 Colo. 3, 147 Pac. 361, 362."

In the case of *Foster v. United States,* 253 Fed. 481 (C. C. A. Ninth Circuit, 1918), the Court said:

"A statutory offense may be so defined that the indictment will sufficiently charge the violation thereof if it follows the language of the statute, but this is so only in cases where the statute apprises the offender from the mere adoption of the statutory terms of the precise nature of the offense for which he is to be tried. Here the statute is very general in its terms, and the indictment merely charges in the language of the statute. Thus in the first count it goes no further than to allege that the accused did wilfully, knowingly, unlawfully, and feloneously make and convey false reports and false statements, with intent to interfere with the operation and success of the military and naval forces of the United States, and to promote the success of its enemies. It conveyed no information to the accused of what the reports were, wherein they were false, nor to whom they were made. It is as bare of information as to the nature of their offense as would have been an indictment charging that at a designated time and place they 'committed larceny.'

"In *United States v. Simmons,* 96 U. S. 360, 24 L. Ed. 819, it was said:

" 'Where the offense is purely statutory, having no relation to the common law, it is, "as a general rule, sufficient in the indictment to charge the defendant with acts coming fully within the stautory description, in the substantial words of the statute, without any further expansion of the matter." 1 Bish. Crim. Proc., P. 611, and authorities there cited. But to this general rule there is the qualification, fundamental in the law of criminal procedure, that the accused must be apprised of the indictment, with reason-

able certainty, of the nature of the accusation against him, to the end that he may prepare his defense, and plead the judgment as a bar to any subsequent prosecution for the same offense. An indictment not so framed is defective, although it may follow the language of the statute.'

"That rule was reaffirmed in substance in United States v. Carll, 105 U. S. 611, 26 L. Ed. 1135, and in United States v. Hess, 124 U. S. 483, 8 Sup. Ct. 571, 31 L. Ed. 516, where the court said:

" 'The object of the indictment is, first to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent, and there must be set forth in the indictment with reasonable particularity of time, place, and circumstances.'

"That doctrine was applied in Keck v. United States, 172 U. S. 434, 19 Sup. Ct. 254, 43 L. Ed. 505, and in Armour Packing Co. v. United States, 209 U. S. 58, 83, 28 Sup. Ct. 428, 52 L. Ed. 681, where the court said:

" 'And it is true it is not always sufficient to charge statutory offenses in the language of the statutes, and, where the offense includes generic terms, it is not sufficient that the indictment charge the offense in the same generic terms, but it must state the particulars.' "

In *Collins vs. United States*, 253 Fed. 609 (C. C. A., Ninth Circuit, 1918), the Court said:

"Where a statute declares that certain or specific acts, or the doing of certain things, shall constitute an offense, it is always necessary to state what the accused did whereby he transgressed the law, in order that he may be advised of the specific charge made against him, to enable him to concert his defense, and to avail himself of his conviction or acquittal against further prosecution of the same cause, and, further, to advise the court of the facts relied on for conviction, so that it may determine whether they are sufficient in law to support the charge. It is not sufficient in such a case to state the supposed offense in the language of the statute. As an apt illustration, by the Criminal Code (Act March 4, 1909, c. 321, S. 125), 35 Stat. 1111 (Comp. St. 1916, Sec. 10295), it is declared that:

" 'Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truely, * * * shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury.'

" 'It can scarcely be contended that an indictment charging perjury simply in the language of the statute would be sufficient, without stating what the oath was that was taken, its falsity, the defendant's belief that it was false, before whom taken, and the other facts and circumstances, as to time, place and subject-matter, sufficiently to apprise the accused of the specific charge made against him, and to inform the court of the substantive facts relied upon for conviction.'

"The Supreme Court has spoken on the subject in no uncertain language. In United States v. Carll, 105 U. S. 611, 26 L. Ed. 1135, the defendant was indicted charged with uttering and substituting a

falsely made, forged, counterfeited, and altered obligation and security of the United States, in the language of the statute, the obligation being set forth according to its tenor; but it was not alleged that the defendant knew the instrument to be false, forged, counterfeited, and altered. On a motion in arrest of judgment, after verdict of conviction, the question was certified to the Supreme Court whether the indictment was sufficient to sustain the verdict. The Supreme Court declared that it was not, and that the omission was matter of substance, and not a defect or imperfection in matter of form only. The Court, speaking through Mr. Justice Gray, has this to say:

> " 'In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished; and the fact that the statute in question, read in the light of the common law, and of other statutes on the like matter, enables the court to infer the intent of the Legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent.' "

We submit that from the foregoing it is abundantly clear that the general rule that an offense may be charged in the language of the statute was not meant to abrogate the rights granted the accused under the Sixth Amendment, but was at all times to be subject to the qualification that the defendant be apprised of the offense for which it was intended that he be punished. Consequently when the language of the statute is general, omits necessary ingredients of the offense, or literally construed embraces innocent acts, it is not sufficient to charge in the language of the statute, but it is imperative that additional aver-

ments be included so that every essential ingredient of the offense will be charged with particularity, directness and definiteness.

Merely charging a defendant in the language of the statute is a far cry from the constitutional guarantee under the Sixth Amendment, and does violence to well-established and scrupulously upheld principles of American Jurisprudence, which were so well enunciated in *Harris v. United States,* 104 Fed. (2d) 41 (C. C. A. Eighth Circuit, 1939):

> "The basic principle of American jurisprudence is that no man shall be deprived of life, liberty or property without due process of law. In a criminal proceeding, the indictment must be free from ambiguity on its face; the language must be such that it will leave no doubt in the minds of the court or defendant of the exact offense which the latter is charged with. It should leave no question in the mind of the court that it charges the commission of a public offense.
>
> "It is fundamental that all the necessary ingredients of the offense must be set out in the indictment, and the omission of any fact or circumstance necessary to constitute the offense will be fatal. United States v. Cruikshank, et al., 92 U. S. 542, 23 L. Ed. 588. Any omission of that nature cannot be supplied 'by intendment or implication, and the charge must be made directly, and not inferentially, or by way of recital.' United States v. Hess, supra."

Point 2

John Benker, a prospective juror, testified he lived at Anthon, Iowa, was a farmer and a member of the Woodbury County "Triple A" Committee. That part of his duties consisted of recommending the issuance of ration coupons for gasoline (R. 32).

This juror further testified that he had something to do with recommendations regarding whether a farmer should have a certain quantity of gasoline with which to operate his machinery; that as a member of the Township Committee, he would make recommendations to the County Committeemen.

The defendant challenged the juror because his examination disclosed that he was an officer of an agency that had to do with the administration of the regulations under which the defendant had been informed against (R. 32).

The challenge was overruled by the Court and an exception allowed (R. 32).

The juror, John C. Duncan, testified that he lived at Dickens and was a farmer.

When examined by Mr. William P. Welch, counsel for the defendant, Mr. Duncan stated, "I am on the Township Committee, Triple A Committe, as a substitute or one that is called upon when some other one can't be there. I am an alternate. I have never been called upon to act." (R. 33.)

The defendant challenged the juror, Duncan, because he was a member of the "Triple A" Committee in Clay County, Iowa.

The Court overruled the challenge and an exception was allowed (R. 34).

The juror, John A. Lullman, when questioned by Mr. Welch, counsel for the defense, stated that he had been an alternate member of the rationing board of Buena

Vista County, Iowa; that this was a "Triple A" Committee (R. 34).

The defendant challenged this juror for the reason that the examination disclosed he was a member of the "Triple A" Committee of Buena Vista County.

The Court overruled this challenge and an exception was allowed (R. 34).

In overruling the challenge, the following record was made:

> "MR. WELCH: He is shown by the examination to be an alternate committeeman.
>
> "THE COURT: Challenge overruled and denied. You may take your place in the jury box." (R. 34.)

The defendant exercised all of his peremptory challenges and struck from the jury the juror, John Benker.

Two of the challenged jurors remained upon the jury (R. 31).

In the case of *Crawford vs. United States,* 212 U. S. 183, 29 S. Ct. 260, 53 L. ed. 465, the Court, in the opinion by Mr. Justice Peckham, which was concurred in by all of the other Justices, except Mr. Justice Moody who took no part in the decision, stated, at pages 470 and 471 of the L. ed., as follows:

> "Taking the contention of the government to be sound, the fact that a proposed juror is a salaried officer of the government can only be ground for his own claim of exemption, which, if not made by him, leaves him a competent juror. A jury composed of government employees where the government was a

party to the case on trial would not in the least conduce to respect for, or belief in, the fairness of the system of trial by jury. To maintain that system in the respect and affection of the citizens of this country it is requisite that the jurors chosen should not only in fact be fair and impartial, but that they should not occupy such relation to either side as to lead on that account, to any doubt on that subject. We do not think that § 215 of the Code of the District included the whole subject of the qualifications of jurors in that District. If that section, together with § 217, were alone to be considered, it might be that the juror was qualified. But by the common law, a further qualification exists. If that law remains in force in this regard in this District a different decision is called for from that made in this case. The common law in force in Maryland, February 27, 1801, remains in force here, except as the same may be inconsistent with or replaced by some provision of the Code for the District, Code, chap. 1, § 1, p. 5. It has not been contended that the common law upon the subject of jurors was not in force in Maryland at the above-named date, or that it did not remain in force here, at least up to the time of the passage of the Code. Jurors must at least have the qualifications mentioned in § 215, but that section does not, in our opinion so far alter the common law upon the subject as to exclude its rule that one is not a competent juror in a case if he is master, servant, steward, counselor, or attorney of either party. In such case a juror may be challenged for principal cause as an absolute disqualification of the juror. 3 Cooley's Bl. Com., 4th *ed., p. 363; Block v. State, 100 Ind. 357, 362. In the Indiana case, Judge Niblack, speaking for the supreme court of that state, held in substance in accordance with the above rule of the common law, and that the Indiana statute upon the qualifications of jurors did not strike out the rule of the common law on the subject, when not inconsistent with the statute. This rule applies as well to criminal as to

civil cases. Mr. Chief Justice Shepard, in his dissenting opinion in this case, cites many cases to the effect that a clerk or employe of a private party or of a corporation is not qualified to sit as a juror in such case, over the objection of the opposite side. Although the cases cited were civil cases and rest mainly on the common law, they are not lessened in weight on that account. On the contrary, they apply with added weight to criminal cases. Modern methods of doing business and modern complications resulting therefrom have not wrought any change in human nature itself, and therefore have not lessened or altered the general tendency among men, recognized by the common law, to look somwhat more favorably, though perhaps frequently unconsciously, upon the side of the person or corporation that employs them, rather than upon the other side. Bias or prejudice is such an elusive condition of the mind that it is most difficult, if not impossible, to always recognize its existence, and it might exist in the mind of one (on account of his relations with one of the parties) who was quite positive that he had no bias, and said that he was perfectly able to decide the question wholly uninfluenced by anything but the evidence. The law therefore most wisely said that, with regard to some of the relations which may exist between the juror and one of the parties, bias is implied, and evidence of its actual existence need not be given.

"The position of the juror in this case is a good instance of the wisdom of the rule. His position was that of an employee who received a salary from the United States, and his employment was valuable to him, not so much for the salary as for the prospect such employment held out for an increase in his business *from the people who might at first come to his store for the purchase of stamps, etc. It need not be assumed that any cessation of that employment would actually follow a verdict against the government. It is thought that it might possibly be the case; and the

juror ought not to be permitted to occupy a position of the nature to the possible injury of a defendant on trial, even though he should swear he would not be influenced by his relations to one of the parties to the suit in giving a verdict. It was error to overrule the defendant's challenge to the juror."

The later case of *United States vs. Wood,* 299 U. S. 123, 57 S. Ct. 177, 81 L. ed. 78, is not in point as it arose under a specific statute of the District of Columbia making Government employees eligible for jury service.

In Title 28, U. S. C. A., Section 725, at page 97, it is provided, as follows:

> "The laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decisions in trials at common law, in the Courts of the United States, in cases where they apply."

The case of *Erie Railroad Co. vs. Tompkins,* 304 U. S. 64, 58 S. Ct. 817, 82 L. ed. 1188, 114 A. L. R. 1487, gave a new interpretation to the above-quoted section and by overruling *Swift vs. Tyson,* 16 Pet. 1, 10 L. ed. 865, clearly established the rule that in the trial of jury cases in the Courts of the United States, whether civil or criminal, the qualifications of the jurors are to be determined by the laws of the State where the case is tried.

The procedure in the Courts of the United States, even before the decision in *Erie Railroad Co. vs. Tompkins,* supra, was to look to the laws of the State where the case was tried in determining the qualifications of jurors.

Section 13830 of the 1939 Code of Iowa, later known as Section 779.5, Sub-Section 5, of the Code of Iowa, 1946,

states that a prospective juror, who stands in the relation of Master and Servant to one of the parties to a civil or criminal case, is disqualified to sit as a juror in the case and may be challenged for cause by the opposing party or his counsel.

We do not believe that there is much doubt about the fact that the Trial Judge should have sustained the challenges to these three jurors.

The defendant was obliged to keep two of the challenged jurors on the jury panel after he had exercised the three challenges which he had under the law in a prosecution for these alleged misdemeanors.

Point 3

A reading of the record set forth in the first section of this brief will show that the prosecution's case was grounded solely upon the evidence given by the self-confessed accomplice, C. T. Studley (R. 36 to 38, incl., and 56 to 61, incl.). He first signed a statement for the OPA investigators that he bought 500 gallons of Ethyl gasoline. The Information charged that 500 gallons were sold to him. He testified that he later informed the District Attorney that it was 200 gallons of Ethyl gasoline and stuck to this story. He was never informed against. He admitted that he had been under quite a bit of pressure from the OPA and was out of business at the time he testified. He put samples of his writing on "Exhibit C." He kept records which he could refer to and refresh his recollection from.

The OPA investigators, Anthony Schneiders (R. 39-40 and 46-47 and 64 to 67) and George Richardson (R. 40

to 43, incl., and 67 to 68), did not add anything to the prosecution's case, as the defendant, John W. Kempe, admitted that he delivered 640 gallons of regular gasoline to Studley on October 4th, 1944, and secured coupons from Studley for same, as evidenced by "Exhibit A," an invoice from the Interstate Oil Co. (R. 53), and "Exhibit B," an initialed invoice.

The other Government witnesses were: R. M. Anderson from the U. S. Weather Bureau, who testified as to Central Standard Time, as distinguished from Daylight Saving Time, and what time the sun rose on October 4th, 1944, and when it became daylight (R. 47), and M. M. Woods (R. 34 to 36, incl.), who testified about the posting of prices in the Standard Oil filling station window at East Pierce and Plymouth Streets, Sioux City, Iowa.

The defendant testified in his own behalf (R. 51 to 56, incl.) and denied the testimony of Studley as to making the sales of 200 gallons of Ethyl gasoline or any amount above ceiling prices, and denied that he sold same to Studley without receiving ration coupons therefor. He identified "Exhibit E" as a sales slip showing that he sold Studley regular gasoline, on October 4th, 1944, receiving the regular price for same and securing the proper amount of coupons therefor, and that the load was delivered to Studley at 7:30 A. M., at about the time Schneiders and Richardson, the OPA agents, saw him, Kempe, at Studley's filling station. That "Exhibits A" and "B" related to this transaction, "A" being the invoice from the Interstate Oil Co., and "B" being the sales slip issued to Studley and initialed by him, which showed the proper price was charged for the gasoline and that the proper amount of ration coupons were given.

The defendant also produced the witness, Fred Riszk (R 48 to 51), who had charge of the sales slips for the Interstate Oil Company, who sold Kempe, the defendant, the 640 gallons of gasoline on October 4, 1944, which was later delivered early that day to Studley.

George W. Hutchins, a commercial photographer, also testified (R. 48), but the photographs were not deemed to be material on this appeal.

The case presented on this appeal is different from a factual standpoint to the prior case reported in *Kempe vs. United States* (8th Cir.), 151 F. (2d) 680. In that case the defendant did not testify and the Government's case was unrefuted and was much stronger factually.

We think that upon a reading of the whole record in this case the evidence was not sufficient to warrant the Trial Court in submitting same to the jury.

Point 4

The record dealing with this Assignment of Error is as follows:

The United States District Attorney, Mr. T. E. Diamond, in the presence of the jury, while the counsel for the defendant was cross-examining the Government witness, Mr. C. T. Studley, made the following comment:

"Q. Now, how many times had you bought gasoline from Mr. Kempe?

A. I wouldn't remember. I don't remember.

MR. DIAMOND: I want the court to note that question. He has opened the door now. (R. 37.)

THE COURT: What was the answer?

A. I don't remember."

It is the contention of the defendant that the statement of the United States District Attorney, to-wit: "I want the court to note that question. He has opened the door now," was highly prejudicial and denied to the defendant a fair and impartial trial because of the implication by the District Attorney that the defendant was guilty of other offenses not laid in the Information.

The United States District Attorney, T. E. Diamond, notwithstanding the decision of this Circuit Court of Appeals for the Eighth Judicial Circuit, in the first appeal of this case, *Kempe vs. United States,* 151 F. (2d) 680, which decision reversed the former conviction of this same defendant on the identical Counts of the Information on which he was convicted in this case upon the ground that reference to other offenses not laid in the Information were prejudicial and denied to the defendant a fair and an impartial trial, propounded to the defendant upon his cross-examination the following question:

"Q. Isn't it a fact that before October 4, 1944, in that summer or fall of 1944, before that date, that you were short of coupons and that you offered to buy coupons from a girl at the Toy National Bank in Sioux City?

MR. WELCH: That is objected to as improper, prejudicial to the rights of the defendant; which refers to a transaction other than those laid in the information, not proper cross-examination; not proper foundation for impeachment.

THE COURT: The objection is sustained.

MR. WELCH: And the defendant also asks

the court to instruct the jury to disregard the question and its implications.

THE COURT: The jury is instructed to disregard any implications in the question." (R. 54 and 55.)

It is true that the Court sustained the objection and the defendant did not ask for a mistrial. However, this defendant respectfully contends in the assignment of error that he was not gambling on what the jury might do in his favor. He had already been tried once and convicted and had secured a reversal and while his financial ability to go to trial times without number is not shown in the record, it was so apparent that the United States District Attorney was bent upon bringing before the jury implications of other violations by the defendant the prejudice wrought by said improper question which was calculated to and did inflame the minds of the jury so that he was denied a fair and impartial trial.

Again the record, beginning with page 64, discloses the following:

"Q. Now, you say there was a talk had but not such a talk. Now, tell the jury, as near as you can recall, everything that was said between you and him on that occasion?

MR. WELCH: Objected to as not rebuttal.

THE COURT: Objection overruled. He may answer. (Exception.)

A. I told Mr. Kempe that we had observed his movements and that we had obtained confessions—

Q. Had obtained what?

MR. WELCH: Objected to as not rebuttal and not referable to the counts in the Informa-

tion, the two counts in the Information. Matters not laid in the pleading against the defendant and not competent and not rebuttal.

MR. DIAMOND: Wait a moment. I will withdraw it or, rather, let me give the witness an admonition. There may be something in counsel's objection. We didn't know he was going to say it.

MR. WELCH: I object to counsel's remarks about my objection.

No ruling by the Court. (R. 65.)

Q. Now, there was nothing on the part of the Government to draw out from the witness anything about transactions other than this one.

MR. WELCH: The defendant objects to the counsel for the Government instructing the witness in making these assertions in the presence of the jury.

MR. DIAMOND: Well, do you want him to go ahead and talk?

THE COURT: Just a minute, Mr. Diamond. The witness will answer the question and will omit any reference to any other transaction.

A. I informed Mr. Kempe that evidence had been obtained.

MR. WELCH: I move to strike. This is not rebuttal and improper in form and incompetent.

THE COURT: Objection overruled. (Exception.)

A. And that I was interested in where he obtained—

Q. I am not asking what you were interested in. Please answer my question directly. What did

he say to you? What did you say to him? Don't repeat any part of the conference if it refers to anything other than the Studley transaction.

MR. WELCH: We object to the statement by the counsel for the Government as highly improper.

THE COURT: Objection overruled. The jury will pay no attention to any implication. You may answer. (Exception.)

A. I told Mr. Kempe that I was interested in the higher-ups and I wanted him to disclose the source of his coupons in order to sell gasoline without coupons. (R. 66.)

MR. WELCH: I move to strike that as highly prejudicial. It assumes matters not in the record and not competent and not referable to the counts in this Information.

THE COURT: Objection overruled. (Exception.)

A. Mr. Kempe did not reply to my question. He just sat there and looked down. I informed him that the evidence—

Q. Don't say 'I informed him.'

A. I told him—

MR. WELCH: I object. It is evident that he is going to give hearsay testimony in the presence of the jury.

THE COURT: Objection overruled. (Exception.)

A. I told him that the evidence we had obtained would possibly result in criminal prosecution for him.

MR. WELCH: I move to strike that as hearsay and highly improper.

THE COURT: Objection overruled. (Exception.)

A. Then Mr. Kempe said he would fight it and clear to the Supreme Court, if necessary."

It certainly was highly improper for the Court to permit the testimony to be adduced that OPA Officer Schneiders told Kempe that he was interested in the higher-ups and wanted him Kempe to disclose the source of his coupons in order to sell gasoline without coupons (R. 66), and that Kempe did not reply to his question, but just sat there and looked down (R. 66). No objection was made to this line of questioning. The question arises that since Kempe was then under arrest and in jail, was there any legal duty for him to answer the officer?

The right of a defendant, after arrest, to remain silent without prejudicing himself when there was a duty to speak has been decided differently by several of the United States Circuit Courts of Appeal. The following cases illustrate the foregoing assertion.

In the case of *Graham vs. United States* (8th C. C. A., Okla.), 15 F. (2d) 740, it was held that even though the defendant was under arrest his silence when there was a duty for him to speak warranted the inference of guilt.

In the case of *United States vs. Lo Biando* (C. C. A. 2d, N. Y.), 135 F. (2d) 130, that Court held to the contrary.

This question, we feel, is of sufficient importance to require a decision by this Court in order to unify the holdings in the various United States Circuits. We feel that this should be done in spite of the fact that Kempe's

attorney, being aware of the rule in this Circuit, made no objection to this line of questioning.

It is true that the Court sustained the objection and the defendant did not ask for a mistrial. However, this defendant respectfully contends in the assignment of error that he was not gambling on what the jury might do in his favor. He had already been tried once and convicted and had secured a reversal and while his financial ability to go to trial times without number is not shown in the record, it was so apparent that the United States District Attorney was bent upon bringing before the jury implications of other violations by the defendant the prejudice wrought by said improper question which was calculated to and did inflame the minds of the jury so that he was denied a fair and impartial trial.

Lastly, the United States District Attorney in his closing argument to the jury asserted that the defendant's lawyer was too able an attorney to overlook not making the Government produce coupons that the defendant claimed he had given to the Government's witness, Studley, and that the reason the defendant's attorney could not make this demand was because there were not any coupons and for that reason the transaction took place as the Government contended. That the jury did not think that the District Attorney, Mr. Diamond, would bring a case into Court having charge of such coupons and that he, Diamond, would not prosecute the case if the Government had got the coupons (R. 67).

The District Attorney further camoflaged his argument with the statement that he, Mr. Diamond, had never practiced such law and hoped he would not engage in

that kind of business, and would be the last man in the world and so would defendant's counsel, Mr. Welch, to bring a man on a charge when either attorney had the coupons with the names of the station man who delivered them to the truck man on them (R. 68).

We will, however, call the Court's attention to the recent Text by Howard & Walser, entitled, "Defending and Prosecuting Federal Criminal Cases," Second Edition, which devotes Chapter No. 42 to "Misconduct of Counsel for the Government." Same is to be found at pages 546 to 556, inclusive. The leading cases of *Berger vs. U. S.*, 295 U. S. 78, 55 S. Ct. 629, 79 L. ed. 1314; *Volkmor vs. U. S.*, 13 F. (2d) 594; *Pierce vs. U. S.*, 86 F. (2d) 949, and *Kassin vs. U. S.*, 87 F. (2d) 183, are discussed and quoted from.

The Chapter opens with the following apt statement:

> "The defendant is entitled to a fair trial, and intemperate, abusive, and overzealous remarks by counsel for the Government during the course of the trial, either in the opening statement, examination of witnesses, or the summation, are often sufficient grounds per se to justify and demand the reversal of a judgment of conviction even though the Court instructed the jury to disregard them."

Again, on page 443 of this text it is stated:

> "Sometimes a single misstep on the part of the prosecutor may be so destructive of the right of a defendant to a fair trial that reversal must follow as in Pharr vs. United States, 48 F. (2d) 767 (C. C. A. 6)."

It has been very properly said in *Leo vs. State,* 63 Neb. 723, 89 N. W. 303:

> "The poison shaft has sped its way, and it is difficult to conceive how the jury could thereafter have been oblivious of or ignored the fact."

We feel that the United States Attorney was guilty of such misconduct as would warrant a reversal of this case.

Point 5

The Trial Court in his 14 instructions to the jury (80-87, incl.) failed to quote or give the context of any Regulation or Law upon which either of the 2 Counts of the Information were grounded.

In Instruction 1 he recited what the 2 Counts of the Information alleged; in Instruction 2 he dealt with the defendant's presumption of innocence; in Instruction 3 he defined terms; in Instruction 4 he defined "reasonable doubt"; in Instruction 5 he dealt with the necessity of Ration Coupons to be collected from gasoline purchasers during October, 1944; in Instruction 6 he dealt with the posting of ceiling prices by the Standard Oil Co. of Indiana; in Instruction 7 he related the essential elements of the alleged offense charged in Count 3; in Instruction 8 he related the essential elements of the alleged offense charged in Count 4; in Instruction 9 he gave the law relative to the testimony of C. T. Studley, the accomplice; in Instruction 10 he recited the law relative to a defendant giving testimony and the consideration which the jury should give same; in Instruction 11 he instructed concerning "falsus in unum, falsus in omnbius." In Instruction 12 he stated that the matter of punishment upon conviction was of no concern to the jury and was solely for the Court; in Instruction 13 he dealt with excluded evidence and told the jury that the issues were those submitted in the instructions, that statements and arguments of counsel

were not evidence, that the jurors should not communicate personal information, but should decide the case on the evidence received by the Court, that the instructions should be considered as a whole, and that neither the instructions, statements or remarks made by the Court should be construed as to what the jury's verdict should be; and Instruction 14 dealt with the credibility of the witnesses, the returning of a true verdict in accordance with the law and the evidence, the selection of a foreman, and the forms of verdicts submitted.

The failure of the Court to read to the jury or give the content of the applicable Laws and Regulations upon which the two Counts of the Information were grounded was and is reversible error. Perhaps the Court was confronted with the same dilemma which counsel for the defendant were confronted with when they tried to find the applicable Laws and Regulations from a reading of the two Counts of the Information.

If one stops to consider he cannot recall probably any case in which he took part where any such unorthodox course of procedure was followed as the Trial Court made use of in this case. Generally the first Instruction given by a Judge deals with the law upon which a prosecution is grounded and then the criminal charge or charges are recited. The procedure followed in this case is so unusual that there is a dearth of decided cases on the subject.

We were, however, fortunate enough to find a case which we believe to be absolutely in point.

It is the case of *Morris vs. U. S.* (9th Circ.), 156 F. (2d) 525. There is to be found in the majority opinion a

very exhaustive discussion of the question as to whether or not in a criminal case a Trial Judge, in his instructions, must submit to the jury the law upon which the prosecution is grounded, to enable the jury to apply that law to the facts so that the jury would not be reduced to "a mere ministerial agent by a direction on their very thought, thereby withholding of a vital right due them." In that case the Trial Judge, as in the instant case, did not submit the basic law and the applicable regulations to the jury, but made a general statement or summation of the criminal charge and the law and regulations upon which same was based, and thereafter told the jury what the essential elements of the offense charged were, and which essential elements he stated must be proved beyond a reasonable doubt before a conviction could be had. The majority opinion delivered by Stephens, Circuit Judge, was that the case should be reversed and remanded because of this way of instructing the jury. Denham, Circuit Judge, wrote a dissenting opinion (pp. 532 to 534).

Our Propositions of Law 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17 were taken verbatim from the syllabus in this case.

In the opinion the Court stated the following:

* * * * *

"(1,2) Several questions are presented on appeal, which we do not reach. It is our opinion that the trial court committed fatal error in failing to instruct the jury on the statutes and regulations defining and governing the offenses charged against the appellant. No assignment of error was made at the trial covering this claimed error, but we consider it because, as is well stated in Suhay v. United States, 10 Cir., 1938, 95 F. 2d 890, 893, '* * * Where life or liberty is involved, an appellate court may notice a serious error which is plainly prejudicial even though

it was not called to the attention of the trial court in any form.' In a criminal case, it is always a duty of the court to instruct on all essential questions of law, whether requested or not. See Screws v. United State, 1945, 325 U. S. 91, 107, 65 S. Ct. 1031, 89 L. Ed. 1495; Corson v. United States, 9 Cir., 147 F. 2d 437; Kreiner v. United States, 1936, 2 Cir., 11 F. 2d 722, Certiorari denied 271 U. S. 688, 46 S. Ct. 639, 70 L. Ed. 1152.

"(3) The court did not define the offense of which the appellant was charged and was being tried, and the jury was given no opportunity of applying the facts to the law. Instead, the judge reserved to himself the duty of applying the law to the facts."

* * * * *

"The jury was never given an explanation or definition or enacted text of the offense charged, but instead were told that if they found certain enumerated facts, the verdict must be one of guilty; otherwise the verdict must be one of not guilty. A jury's duty cannot be so limited by a judge. There is no better grounded instruction than the one used in every criminal jury trial, including this one, that the court gives the law to the jury and the jury applies it to the facts. Here, by the instruction, quoted, the judge reserved the law to himself and told the jury that the law applies in a certain manner defined by him to sets of facts which the jury may or may not find."

* * * * *

"(4) The classical practice is that the judge delivers the applicable law of the case, defining and explaining the offense charged against the defendant, and the jury thus being informed as to the exact law, which they must determine has been or has not been violated by the defendant, places its determination of the facts alongside the law and reports in the open court in a single verdict of 'guilty' or 'not guilty.' Sparf v. United States, 1895, 156 U. S. 51, 715, 15 S.

Ct. 273, 39 L. Ed. 343; 1 Randall, Instructions to Juries, §§ 1, 97, 118; Hughes, Criminal Law and Procedure, pp. 693, 696. Instructions upon the law have been repeatedly defined as statements or announcements of the *rules* of *law* to be applied by the jury to the facts found by them. 1 Blashfield, Instructions, §§ 1, 4; 2 Bishop, New Crim. Pro., §§ 978, 982c."

* * * * *

"(5) Where the instruction or charge of the court is based upon a statute which is sufficiently clear, the judge may set forth the statute in the instruction, otherwise he should explain it in other language in order that the jury may have a clear understanding of the law before applying it to the facts. See Sloovere, Functions of the Judge and Jury in the Interpretation of Statutes, 46 H. L. R. 1086."

* * * * *

"(6, 7) The charge to the jury should not leave the jurors in ignorance of or leave them to their conjecture as to what constitutes the offense charged."

* * * * *

"(13) Rather persuasive arguments are made from time to time for the streamlining of the jury system in the interest of efficiency or upon the ground of ineptness of jurors. However, thoughtful and scholarly lawyers and judges, including the very learned judge who presided in the instant case, have fought to preserve the system in its natural vigor. The method used in the instant case loses its surface merit upon a study of the principles underlying the judge and jury system of judicature."

In order to appreciate fully the correctness of this decision one should read the entire opinion.

In the opinion the Court held that the appropriate instructions should have been requested by the defendant,

but this could not be correct because, as heretofore stated in *Morris vs. U. S.*, supra, it was the duty of the Court to instruct on all essential questions of law, whether requested or not. Thus again we are confronted with different holdings in the 8th Circuit and the 9th Circuit, which differences should be disposed of by this Court.

CONCLUSION

For each and all of the reasons herein assigned we urge that this case either be reversed and dismissed or reversed and remanded for a new trial.

Respectfully submitted,

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